United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

In The

United States Court of Appeals

For The

District of Columbia Circuit

No. 23991

Franklin E. Kameny, et al.,
Appellants,

v.

Randolph W. Thrower, Commissioner
of Internal Revenue,
Appellee,

On Appeal From The United States District

Court For The District of Columbia

Brief for Appellants

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C O N T E N T S

TABLE OF CITATIONS

* Cases or authorities chiefly relied upon are marked by asterisks

STATEMENT OF ISSUES PRESENTED

1. Whether a justiciable case or controversy is presented when a regulation of the Internal Revenue Service which prohibits Service employees from associating off-duty with persons who are believed or known to be homosexuals is challenged by a homosexual and/or by organizations dedicated to improving the status of homosexuals and/or by actual and potential members and sympathizers of such organizations on the ground that First and Fifth Amendment rights are substantially chilled by such regulation.

2. Whether standing to challenge a regulation of the Internal Revenue Service which prohibits Service employees from associating off-duty with persons who are believed or known to be homosexuals lies in a homosexual not employed by the Service and/or by organizations dedicated by improving the status of homosexuals and/or the members (actual and potential) and sympathizers of such organizations.

The pending case has not previously been before this Court under the same or similar title.

REFERENCES TO RULINGS

The following rulings by the District Court are pertinent to this case:

1. The Court stated that there had to be a relationship between the plaintiffs and the defendant (Tr. pp. 3-9) for there to be justiciable controversy.

2. The Court ruled that the complaint fails to state a cause of action. (Tr. p. 10)

STATEMENT OF THE CASE

Preliminary Statement

This is a suit for injunctive and declaratory relief. Plaintiffs filed a complaint requesting that defendant, Commissioner of Internal Revenue, be enjoined from interrogating, disciplining and/or terminating the employment of any Internal Revenue Service (Service) employee solely because he is alleged or found to have associated with an alleged or known homosexual. Plaintiffs' complaint also requested that defendant be required to revise § 1942.31 of the Internal Revenue Manual contained in the "Rules of Conduct for Internal Revenue Service Employees" (Rev. 10-63) (Manual) to make it clear that Service employees are not prohibited from associating with homosexuals other than in connection with official business. Defendant filed an answer to plaintiffs' complaint alleging that the District Court lacks jurisdiction of the subject matter, that the complaint fails to state a claim upon which relief can be granted and denying that § 1942.31 of the Manual or actions of defendant pursuant thereto invade the rights of plaintiffs.

Statement of Facts

This appeal concerns whether or not the District Court erred in granting defendant's motion to dismiss. When defendant's motion came before Judge McGuire for argument, plaintiffs' attorney contended that plaintiffs' case presented

a justiciable controversy. (Tr. pp. 3-6, 8-9) The Court ruled that there was no justiciable controversy and that the plaintiffs had no standing, apparently on the ground that the plaintiffs demonstrated no connection with or relationship to defendant. (Tr. pp. 4, 7, 9-10) (The Court ruled also that the complaint fails to state a claim upon which relief can be granted. (Tr. p. 10) Since this ruling was based on the same reasoning which precipitated the Court's ruling of nonjusticiability, it will not be specifically referred to hereinafter.)

Plaintiff Kameny is a homosexual by inclination and by life-style. (Complaint p. 2) In other words, he is homosexual by conscious choice and preferred orientation. As such and as a champion of equal rights for homosexuals, Kameny joined in this action against the Commissioner of Internal Revenue to challenge the Commissioner's interpretation and application of § 1942.31 of the "Rules of Conduct for Internal Revenue Service Employees" (Rev. 10-63) (Complaint p. 3). The Commissioner interprets and applys § 1942.31 to preclude Service employees from associating with persons who are known or believed to be homosexuals, except in connection with official business. (Complaint pp. 3-4) Service employees who violate this rule are subjected to interrogation, disciplinary action or termination of employment with the Service. (Complaint pp. 4-5) Such employees, therefore, will not associate with Kameny because of the inhibiting and chilling effect of the rule. A fortiori, Kameny is denied his First

Amendment right to associate freely with such employees.

The Mattachine Society of Washington, one of the two plaintiff organizations, is a civil liberties, information - education, social service organization dedicating to improving the status of homosexuals. (Complaint p. 2) Membership in The Mattachine Society is open to all adults (whether homosexual or heterosexual) who support its statement of purpose, which includes the following:

> (a) To secure for homosexuals the right to life, liberty, and the pursuit of happiness, as proclaimed for all men by the Declaration of Independence, and to secure for homosexuals the basic rights and liberties established by the word and the spirit of the Constitution of the United States;
>
> (b) To equalize the status and position of the homosexual with those of the heterosexual by achieving equality under law, equality of opportunity, and equality in the society of his fellow men, and by eliminating adverse prejudice, both private and official;
>
> (c) To secure for the homesexual the right, as a human being, to develop and achieve his full potential and dignity, and the right, as a citizen, to make his maximum contribution to the society in which he lives;
>
> (d) To inform and enlighten the public about homosexuals and homosexuality;
>
> (e) To assist, protect, and counsel the homosexual in need.

The North American Conference of Homophile Organizations, the other plaintiff organization, is a nationwide association of approximately twenty-five organizations similar to the Mattachine Society. (Complaint p. 2) It represents and is

working in behalf of the entire United States homosexual community.

As a result of the Commissioner's interpretation and application of § 1942.31, the plaintiff organizations are denied their rights to receive contributions from, grant membership to, and retain as such members, any Service employee. Because of the inhibiting and chilling effect of § 1942.31, Service employees are effectively precluded from contributing to, joining, or retaining membership in the plaintiff organizations. If any Service employee did otherwise, under § 1942.31 he would be subject to interrogation, disciplinary action or termination of employment with the Service. (Complaint pp. 3-4) Therefore, the plaintiff organizations are denied their rights not to be deprived of liberty and property without due process of law as provided in the Fifth Amendment to the United States Constitution. Furthermore, the actual and potential members of such organizations are denied their First Amendment right to free association.

Argument

I. THE DISTRICT COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS THE CASE SINCE THE CASE PRESENTS A JUSTICIABLE CASE OR CONTROVERSY

This case concerns the chilling effect a rule of conduct of a governmental agency has on the exercise of rights protected by the First and Fifth Amendments to the Constitution. The First Amendment right involved is that of freedom of

association of the individual plaintiff (Kameny) and of the plaintiff organizations, its members and potential members. The Fifth Amendment right involved is that of the right of the plaintiff organizations not to be deprived of liberty and property without due process. The case is justiciable with respect to both the chill to a First Amendment right and the chill to Fifth Amendment rights.

In National Student Association v. Hershey, 412 F. 2d 1103, ____ U.S. App. D.C. _____ (1969), this Court recently set down standards to be followed in ascertaining whether a First Amendment chilling effect may give rise to a justiciable case or controversy. See also National Association of Letter Carriers v. Blount, 305 F. Supp. 546 (D.C. D.C. 1969). After reviewing relevant Supreme Court pronouncements on justiciability, this Court stated:

> In sum, we must reconcile the newly recognized urgency of prompt protection for frail First Amendment interests with the traditional policies underlying the case or controversy requirement. We must do so in uncharted waters, certain only that where there is only a "general threat of enforement," not every chilling effect on protected expression resulting from the threat creates a justiciable controversy. Cognizant of the Supreme Court's expressed reluctance to adopt any "precise test" for a case or controversy, we conclude that we should decide the justiciability of suits predicated on alleged chilling effects on a case-by-case basis. In determining whether a given chilling effect is sufficient, it would seem relevant to consider inter alia: (1) the severity and scope of the alleged chilling effect on First Amendment freedoms, (2) the likelihood of other opportunities to vindicate such First Amendment rights as may be infringed with reasonable promptness, and (3) the nature of the issues which a full adjudication on the

> merits must resolve, and the need for factual referents in order properly to define and narrow the issues. These considerations become relevant, of course, only if the plaintiffs plausibly allege that they are in fact vulnerable to the alleged chilling effect. National Student Association v. Hershey, 412 F. 2d at 1115, ____ U.S. App. D.C. at ____.

The three tests as to justiciability when a chilling effect is involved established in National Student Association will be examined hereinafter in the context of the rule of conduct in question (§ 1942.31). After establishing that this case is justiciable, it will be demonstrated that plaintiffs have standing to bring this suit.

> A. Section 1942.31 of the "Rules of Conduct for Internal Revenue Service Employees" provides a substantial chill to First Amendment rights of plaintiffs.

The rule of conduct in question provides as follows:

> Except in connection with official business, employees may not associate with individuals or groups when the association tends to discredit, directly or indirectly, the character, reputation, or integrity of the employee or of the Revenue Service. Unjustified association with persons who are believed, or known to be connected with illegal, immoral, or reprehensible activities, is forbidden because the association by the employee might tend to connect the employee or the Service with such activities of these persons. Employees should bear in mind that they will be held responsible in the event of adverse publicity stemming from, or connection with, their association. Section 1942.31, "Rules of Conduct for Internal Revenue Service Employees" (Rev. 10-63) (Complaint p. 3)

(1) Severity and scope of chilling effect of the rule of conduct

Applying the first test established by the Court in National Student Association, it is clear that this rule of

conduct acts as an effective and severe chill to the exercise of legal and protected conduct. By its terms, § 1942.31 prohibits nonbusiness association by Service employees with individuals or groups believed or known to be connected with "illegal, immoral, or reprehensible activities." The interrogatories filed by plaintiffs, if answered by the government, will show that nonbusiness association with persons who are believe or known to be homosexuals is proscribed by this rule. Because of the existence of § 1942.31, therefore, Service employees would be hesitant to associate with plaintiff Kameny, with plaintiff organizations or with the members or sympathizers of such organizations for to do so would result in interrogation, disciplinary action or firing by the Commissioner. Thus, § 1942.31 proscribes free association, a right specificially protected by the First Amendment. Paraphrasing the Supreme Court's holding in United States v. Robel, 389 U.S. 258, 265 (1968):

> The [rule of conduct] quite literally established guilt by association alone, without any need to establish that an individual's association poses the threat feared by the Government in proscribing it. The inhibiting effect on the exercise of First Amendment rights is clear. [footnote omitted]

Accordingly, there should be no doubt that § 1942.31 "works a pronounced chilling effect on legal or protected conduct." National Student Association v. Hershey, 412 F. 2d at 1119, _____ U.S. App. D. C. at _____.

(2) Likelihood of other opportunities to vindicate the rights chilled by the rule of conduct

The second test forwarded by the Court in National Student Association is also met by the case at bar. If this complaint does not lie, the chill of § 1942.31 may spread indefinitely without any judicial determination of its legality. This Court has recently recognized that to be fired for homosexuality by the government "imposes a 'badge of infamy,' disqualifying the victim from any further Federal employment, damaging his prospects for private employ, and fixing upon him the stigma of an official defamation of character." Norton v. Macy, 417 F. 2d at 1164, _____ U.S. App. D. C. at _____ [footnotes omitted]. A Service employee, although wanting to associate with individuals who may be homosexuals, will think more than twice before he does so because of the adverse effect on his employment opportunities if such association is discovered by the Commissioner. Likewise, a Service employee will more than hesitate before contributing to, joining or retaining membership in either of the plaintiff organizations in question. The byproduct of association with homosexual individuals or groups, the Service employee knows, can lead to economic disenfranchisement. (The effect of discrimination in employment against homosexuals has been characterized in the Final Report of the Task Force on Homosexuality (National Institute of Mental Health 1969), p. 20, as "engendering anxiety and frustrating legitimate achievement motivation.")

The existence of § 1942.31 since at least 1963 indicates that, if this complaint is not heard, the chill of § 1942.31

may continue indefinitely without any judicial determination of its legality. The ability of the federal government generally through the Civil Service Commissioner to stifle challenges to the government's policy of exclusion of homosexuals has been noted recently in the following terms:

> [T]he general policy of excluding homosexuals from the [Civil] Service has been effectively insulated from judicial review. Litigation arising from exclusion has beed decided on procedural grounds .... Note, Government-Created Disabilities of the Homosexual, 82 Harv. L. Rev. 1738, 1748 (1969)

The warning of the Supreme Court in NAACP v. Button, 371 U.S. 415, 433 (1963) that First Amendment freedoms are fragile and must be protected is relevant here:

> The [First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanction may defer their exercise almost as potently as the actual application of sanctions .... Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity ....(Emphases added)

Summarizing, no employee of the Service will likely jeopardize his position with the Service by bringing an action against the rule of conduct. Furthermore, a Service employee accused of associating off-duty with homosexuals will most likely be persuaded to resign quietly because of his natural desire to avoid adverse publicity which would result from challenging the rule of conduct. The chill of § 1942.31, therefore, may spread indefinitely if this suit is not heard.

(3) Nature of the issues

The third and final test laid down by the Court in National Student Association is likewise met here. Even

though § 1942.31 does not on its face apply to homosexuals, a trial of the case will demonstrate that this rule is so applied. The interrogatories filed by plaintiffs in the action below, which precipitated defendant's motion to dismiss, will, if answered, provide the elements of specificity and narrowness needed to bring this case within the justiciablity requirements imparted by what remains of United Public Workers v. Mitchell, 330 U.S. 75 (1947). See National Association of Letter Carriers v. Blount, supra, and cases cited therein. Indeed, the imagination does not have to be stretched to ascertain that the federal government relies on its prohibition of "immoral" conduct to deal harshly with employees accused of homosexuality. See e.g., Norton v. Macy, 417 F. 2d at 1165, _____ U.S. App. D. C. at _____, especially footnote 18.

B. Section 1942.31 provides a substantial chill to Fifth Amendment rights of plaintiffs

Whether or not the injuries to plaintiffs' First Amendment right of free association are sufficient to make this case justiciable, it is unquestionable that there is a justiciable controversy with respect to the injuries to the plaintiff organizations' Fifth Amendment right not to be deprived of liberty and property without due process of law. The existence although not the exact number of homosexuals in our society has been well documented. For instance, the NIMH Task Force on Homosexuality, supra, p. 4 states that:

> Although estimates of the prevalence of homosexuality are only tentatively established,

> it is believed that there are currently at least three or four million adults in the United States who are predominantly homosexual and many more individuals in whose lives homosexual tendencies or behavior play a significant role.

See also Kinsey, Pomeroy and Martin, Sexual Behavior in the Human Male, 623, 650-651 (1948). Because of the large number of homosexuals in the United States and the large work-force of the Service, it must therefore be assumed and judicially noticed that homosexuals are employed by the Service. See Norton v. Macy, supra, footnote 28. Because of the chill of § 1942.31, the plaintiff organizations are deprived of the financial and membership support of Service employees. That such injury is sufficient to give rise to a justiciable controversy has long been recognized by the Supreme Court. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925).

C. The appellants have standing to challenge § 1942.31

Having demonstrated that First and Fifth Amendment rights have been chilled sufficiently to constitute a justiciable controversy, it is also clear that plaintiffs have standing to challenge § 1942.31. The individual plaintiff (Kameny) has suffered injury in fact inasmuch as Service employees, because of the inhibiting and chilling effect of § 1942.31, must decline to associate with him. Cf. National Student Association v. Hershey, 412 F. 2d at 1119, footnote 46, ___ U.S. App. D. C. at _____; Emerson, Freedom of Association and Freedom of Expression, 74 Yale L. J. 1,32 (1964). The

Supreme Court has recently pointed out that standing may flow from noneconomic values as well as from economic injury, Association of Data Processing Service Organizations, Inc. v. Camp, _____ U.S. _____, 38 U.S. L. W. 4139 (1970). See also Allen v. Hickel, _____ F. 2d _____, _____ U.S. App. D. C. _____ (No. 23,544 April 10, 1970). Kameny's interest in free association with Service employees may be characterized as of a political and cultural nature. This imparts the necessary injury in fact, as the Supreme Court has recognized that:

> [I]t is immaterial within the beliefs sought to be advanced by association pertain to political or cultural matters, and state action which may have the effect curtailing the freedom to associate is subjected to the closest scrutiny. National Association for the Advancement of Colored People v. Alabama, 357 U.S. 449, 356-357 (1958).

It is clearer still that the two plaintiffs organizations have standing. The Mattachine Society of Washington, one of the plaintiff organizations, is a civil liberties, information-education, social service organization dedicated to improving the status of homosexuals and is suing in its behalf and in behalf of its members, either actual or potential. The North American Conference of Homophile Organizations, the other plaintiff organization, is a nationwide association of approximately twenty-five organizations similar to the Society and is working in behalf of the entire United States homosexual community. As such, the Conference is suing for itself and in behalf of its members, actual or potential, and in

behalf of sympathizers.

As § 1942.31 is applied, the chilling effect for Service employees thereof is that they may not join or contribute to such organizations or associate with any of their members since the organizations and its members are engaged in what the defendant may consider illegal, immoral or reprehensible activities. The associations, furthermore, may lose any Service employees who may already be members. The existence of homosexuals and those who would be sympathetic to homosexuals in the employ of the Service has to be assumed and judicially noticed because of the existence of millions of homosexuals in the United States. See Norton v. Macy, supra, at footnote 28. The existence of such Service-connected homosexuals or sympatizers is sufficient, therefore, to impart standing to the organizations and their members. NAACP v. Button, supra; NAACP v. Alabama, supra. These individuals should be able to remain unidentified since exposure would subject them to retaliation. As the Supreme Court has stated:

> This Court has recognized the vital relationship between freedom to associate and privacy in one's association .... Inviolability of privacy in group association may in many circumstances be indispensible to preservation of freedom of association particularly where a group exposues dissident beliefs ...
> NAACP v. Alabama, 357 U.S. at 462.

See also National Association of Letter Carriers v. Blount, supra. Standing also lies for the plaintiff organizations because of the likelihood of diminished financial

support and membership which the chilling effect of § 1942.31 entails. NAACP v. Alabama, supra; National Student Association v. Hershey, supra.

Conclusion

The District Court's dismissal of the case for lack of justiciability and standing with respect to the appellants should be reversed and the cause should be remanded for a trial of the case.

Respectfully submitted

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In

THE UNITED STATES COURT OF APPEALS

for

THE DISTRICT OF COLUMBIA CIRCUIT

No. 23991

FRANKLIN E. KAMENY, et al.,

Appellants,

v.

RANDOLPH W. THROWER, Commissioner of Internal Revenue, Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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I N D E X

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MISCELLANEOUS

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RANDOLPH W. THROWER,
Commissioner of Internal Revenue, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

Appellants filed their main brief in this proceeding on May 25, 1970. Appellee filed its brief on July 1, 1970. Appellant's reply brief is due July 20, 1970.

ARGUMENT

I. This case presents a justiciable case or controversy as to each appellant.

The rule of conduct of the Internal Revenue Service (hereinafter referred to as the Service) at issue presents a judicially cognizable chilling effect on the First and Fifth Amendment rights of appellants. In answer to the

misleading assertion of appellee regarding the federal jurisdictional basis for this suit, the justiciability of this case rests on the following:

1. A Service rule (§ 1942.31) exists which forbids Service employees from off-duty associations with "persons who are believed or known to be connected with illegal, immoral or reprehensible activities."

2. The Commissioner of Internal Revenue does interpret this phrase of the rule to include homosexuals.

3. The Commissioner does apply the rule against Service employees who associate off-duty with homosexuals by harrassing, disciplining and/or firing such employees.

4. Because of the foreseeable nature of such adverse action against Service employees who violate such rule, Service employees will, quite naturally, tend not to associate with appellant, Kameny, or with the organizational appellants and their members.

5. In chilling the association proscribed by the rule, the appellants are denied their First Amendment right of free association; in addition, the organizational appellants are

denied their Fifth Amendment right not to be deprived of property (dues and other support) without due process.

Appellee places chief reliance on United Public Workers v. Mitchell, 330 U.S. 75 (1947), in asserting the nonjusticiability of the chill to the exercise of the constitutional rights of appellants. It is argued that a chill to the exercise of constitutional rights "must be not merely contingent but clear and present in order for federal courts to act." (Appellee's brief, p. 6). Appellee overrelies on Mitchell, however, in addition to forwarding an unduly strict "clear and present threat" test. The answer of the Court in National Association of Letter Carriers v. Blount, 305 F. Supp. 546 (D.C. D.C. 1969) to similar assertions is dispositive of appellee's arguments:

> . . . When action against a worker for legitimate First Amendment activity is actually begun or clearly imminent, the Government insists, is time enough for a court test.
>
> Superficially, this argument has great appeal. The Government relies chiefly on United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). Mitchell cuts strongly in the Government's favor, and, if that case retained its full force, it would be difficult to conclude that a justiciable controversy exists here. The fact is, however, that subsequent case law has weakened

Mitchell as precedent in First Amendment cases. Mitchell was decided prior to judicial recognition of the so-called "chilling effect" doctrine. More recent cases indicate that where freedoms of expression and association are involved, the threat alone of loss of job, criminal sanction or other penalty may inhibit, or "chill" their exercise and thus require court intervention to preserve them. In short, "immediate and real injury is done to the plaintiff's interests if he does not speak or act as he says he wants to * * * [because of] the threat of enforcement." National Student Ass'n v. Hershey, D.C. Cir. 412 F.2d 1103, 1111 (1969); Wolff v. Selective Service Local Board No. 16, 372 F.2d 817 (2nd Cir. 1967); see also, Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed. 2d 22 (1965); Cramp v. Board of Public Instruction, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed. 2d 285 (1961).

Of course, not every conceivable chill to the exercise of First Amendment rights is justiciable. The Second Circuit in Wolff v. Selective Service Board No. 16, 372 F.2d 817 (2d Cir. 1967), read Dombrowski v. Pfister, 380 U.S. 479 (1965), to say that a foreseeable First Amendment injury is irreparable and therefore constitutes a justiciable chill. See National Student Association v. Hershey, 134 U.S. App. D.C. 56, fnte 28, 412 F.2d 1103, fnte 28 (1969). This Court, in National Student Association, established a three-pronged test to be applied in ascertaining whether a chill is justiciable. Whether the standard set forth in Wolff or in National Student

Association is used, it is clear, as appellants adequately demonstrated in their principal brief, that the chill to appellants' First and Fifth Amendment rights is justiciable.

II. The Appellants have standing to challenge the Service's rule of conduct.

Inasmuch as Service employees must decline to associate with appellant, Kameny, because of the inhibiting and chilling effect of the rule of conduct, it is clear that appellant, Kameny, has standing to challenge the rule. Kameny is not asserting the rights of some other person; on the contrary, he is injured in fact (albeit indirectly) by the existence of the rule and thus has standing to challenge the rule of conduct. Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702; Association of Data Processing Service Organizations, Inc. v. Camp, ___ U.S. ___, 38 U.S.L.W. 413 (1970).

Standing likewise lies in the organizational appellants to challenge the rule, on their behalf and on behalf of their members, actual or potential, and sympathizers. As pointed out in appellants' principal brief (p. 15), because of the chill of the rule, Service employees will not join or contribute to such organizations or associate off-duty with any of their members. Additionally, the organizations may lose any Service employees who may already be members. Finally, because of the chill, the organizational appellants

will likely lose financial support and memberships.

Appellee argues that since this is not a class action, appellant organizations may not sue in behalf of its members and that, in any event, there has been no allegation that any Service employee is a member. Appellants did not bring this suit as a class action, but if the Court deems it necessary or appropriate that this matter be resolved by a class suit, the requisites for such a suit are present here. If necessary, the Court can order that the case be transformed into a class action. See, Moore, Federal Courts, ¶ 23.02 (2d ed. 1969). The rights of appellant organizations and their members, however, can be resolved without the necessity of framing this suit as a class action.

The Mattachine Society is a civil liberties, information-education, social service organization dedicated to improving the status of homosexuals. Membership in The Mattachine Society is open to all adults (whether homosexual or heterosexual) who support its statement of purpose (appellants' principal brief, p. 5). The North American Conference of Homophile Organizations is a nationwide association of approximately twenty-five organizations, similar to The Mattachine Society, and is working in behalf of and representing the entire United States homosexual community. Because of the nature of the organizations,

names of members are kept highly confidential in view of the likelihood of social psychological and economic repression to which homosexuals are subjected. In fact, members may join under pseudonyms to protect their anonymity. The organizations do not know whether any of their members are Service employees. On the other hand, because of the large number of homosexuals in the United States, it must be judicially noticed that many homosexuals who are members (actual or potential) or sympathizers of the organizations are employed by the Service, in view of the magnitude of its work force. See Norton v. Macy, ___ U.S. App. D.C. ___, 417 F.2d 1164, 1167, fnte 28, (1969). Any chilling effect on the protected associations of the present or prospective members of the appellant organizations attributable to the Service's rule of conduct is, at the same time, a damper on the organizational activities of such appellants. See National Student Association v. Hershey, supra,fnte 48. The organizational appellants, therefore, have standing to assert their own First and Fifth Amendment interests and the First Amendment interests of their members, present or prospective. NAACP v. Button, 371 U.S. 415 (1963); United Federation of Postal Clerks v. Watson, ___ U.S. App. D.C.___, 409 F.2d 462 (1969); for additional citations, see National Student Association v. Hershey, supra, fnte 50.

CONCLUSION

The District Court's dismissal of the case for lack of justiciability and standing with respect to the appellants should be reversed and the cause should be remanded for a trial of the case.

Respectfully submitted,

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